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Human Rights in the European Union: Internal Versus External Objectives

Elizabeth Shaver Duquette*

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Introduction

With the beginning of the 21st century, calls for a more unified and effective European Union (EU or Union) human rights policy grow ever louder. This Article will discuss the roots of such a policy and its future objectives after discussing the current fractured EU human rights policy. The internal development and objectives of the European Community (EC) human rights policy are markedly different from those of its external human rights policy. Constitutional issues, such as legal bases, present an ongoing concern for the Council of the European Union (Council) and the European Commission (Commission) in drafting legislation, as well as for the European Court of Justice (ECJ) in interpreting such legislation. Although the EU, the EC and their respective institutions acknowledge the legal difficulties, they continue to press ahead with rhetoric espousing a firm commitment to a coherent human rights policy rather than making a genuine attempt to effectuate a consistent policy. Furthermore, when the policy is applied, coherence and uniformity take a back seat to politics. Given such a state of affairs, this Article will primarily focus on the EU's application of its human rights policies in China and Myanmar,¹ with the hope of elucidating the true impetus for the EU's laudable goal of effectively promoting fundamental human rights throughout the world.

I. Human Rights Policy Development Within the European Community

A. The Establishment of the European Community

The European Economic Community began when Belgium, France, Germany, Italy, Luxembourg, and the Netherlands signed the European Economic Community Treaty (EEC Treaty), also known as the Treaty of Rome, which came into force on January 1, 1958.² The EEC, now the European Community, is one of three Communities which together form the first of the Three Pillars of the European Union. Unlike the First Pillar of the EC, the Second and Third Pillars are essentially formalized intergovernmental

1. Due to space constraints, I will compare the EU's application of its human rights policies in these countries only. However, as the wealth of literature illustrates, the EU exercises great diversity in its efforts to attain human rights goals depending on its political relations with numerous third countries.

2. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25 1957, 298 U.N.T.S. 11, amended by TREATY ON EUROPEAN UNION, Feb. 7, 1992, O.J. (C 224) 1 (1992) [hereinafter TEU], amended by TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340) 1 (1997) [hereinafter TREATY OF AMSTERDAM]. The Treaty is now the CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3 (1997) [hereinafter EC TREATY]. The Member States originally formed the European Coal and Steel Community (ECSC). TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, 261 U.N.T.S. 140. This treaty is to expire in 2002. Subsequently, the original Member States signed the European Atomic Energy Community (Euratom) Treaty to address the non-military use of atomic energy. TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 167. The Euratom Treaty was signed in conjunction with the EEC Treaty and has no expiration date.

cooperation entities. Title V of the Treaty on European Union (TEU) establishes the common foreign and security policy (CFSP), known as the Second Pillar.³ Title VI of the TEU provides for police and judicial cooperation in criminal matters, known as the Third Pillar.⁴

B. The Development of Human Rights as a General Principle of EU Law

Article 2 of the Treaty Establishing the European Community (EC Treaty) states the broad objectives of the EC, most of which are economic in nature.⁵ Unlike the EC Treaty, the Treaty of Rome did not identify the protection or promotion of human rights as one of the objectives of EC law. Rather, the ECJ, through case law, developed the notion of fundamental human rights as a general principle in EC law.⁶ Over the years, but especially in the wake of World War II, the concept of fundamental human rights has evolved. The spectrum of human rights protections now ranges from the protection of the physical body—as in the right to be free from torture—to basic economic interests—as in the right to earn a living.⁷ In tandem with this general expansion of human rights protections, the scope of the EC Treaty has also broadened as the ECJ continues to apply and create legal principles to protect fundamental human rights.

The creation of the strong protections of fundamental human rights in EC law was not, however, intentional. Rather, it was a by-product of the ECJ's efforts to establish the supremacy of EC law. The ECJ strives to maintain supremacy of EC law over national law as a means of ensuring the effectiveness of EC law.⁸ The ECJ first announced in *Van Gend en Loos*,⁹ and then in *Costa v. ENEL*,¹⁰ the basic principle that EC law will prevail over Member States' national laws.¹¹ While Member State national courts generally accept this principle today, this was not always the case. German national courts were the first to argue that EC law should not necessarily prevail over the German Constitution—especially not over those provisions dealing with the protection of fundamental human rights.¹² In an effort to prevent a possible “rebellion” by the national

3. TEU tit. V.

4. *Id.* tit. VI.

5. EC TREATY art. 2. This Article uses the new treaty numbering that came into effect on May 1, 1999 with the Treaty of Amsterdam. Unless otherwise designated, all treaty references are to the European Community Treaty.

6. T. C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 130-147 (4th ed. 1998) [hereinafter *FOUNDATIONS*].

7. Case 44/79, *Hauer v. Land Rheinland-Pfaltz*, [1979] E.C.R. 3727.

8. *FOUNDATIONS*, *supra* note 6, at 132.

9. Case 26/62, *Van Gend & Loos v. Nederlandse Administratie der Belastingen*, [1963] E.C.R. 1, 2 C.M.L.R. 105 (1963).

10. Case 6/64, *Costa v. ENEL*, [1964] E.C.R. 585, 3 C.M.L.R. 425 (1964).

11. Case 26/62, *Van Gend & Loos v. Nederlandse Administratie der Belastingen*, [1963] E.C.R. 1, 2 C.M.L.R. 105 (1963); Case 6/64, *Costa v. ENEL*, [1964] E.C.R. 585, 3 C.M.L.R. 425 (1964).

12. See generally Case 11/70, *Internationale Handelsgesellschaft v. EVGF*, [1970] E.C.R. 1125, 11 C.M.L.R. 225 (1972).

courts, the ECJ quickly announced a concept of EC human rights under which all EC law would be scrutinized.¹³ The ECJ's internal human rights policy thus sprang from a desire to pacify potentially disobedient Member States rather than from any innate sense of obligation to advance the level of human rights protection throughout the EC.

In *Stauder v. City of Ulm*, the ECJ announced its new doctrine of "fundamental human rights enshrined in the general principles of Community law and protected by the Court."¹⁴ In pursuit of its continuing crusade for absolute supremacy of EC law, the ECJ boldly announced in *Internationale Handelsgesellschaft v. EVGF* that the validity of EC law could be judged only by the EC's own criteria for fundamental human rights—national notions of human rights were irrelevant.¹⁵ In *Internationale Handelsgesellschaft*, the applicants argued to a German administrative court that an EC export license system violated their fundamental human rights, as defined by the German Constitution.¹⁶ When the case was before the ECJ, it rejected the applicants' argument and opined that although the EC's formulation of human rights may be inspired by national constitutional traditions, its validity is based solely on EC law.¹⁷ Ultimately, the ECJ held that the EC export license system did not violate the EC concept of human rights.¹⁸

The German courts initially reacted strongly to the ECJ's sweeping proclamations, thus threatening the very foundations of the supremacy principle. After the ECJ's *Internationale Handelsgesellschaft* opinion, the German Constitutional Court itself addressed the issue of whether the EC export license system violated the German Constitution.¹⁹ It essentially held that the EC's promise to protect fundamental human rights was an empty one given that the EC not only failed to define what rights would be considered fundamental human rights, but also lacked the legislative ability to do so democratically.²⁰ It concluded, therefore, that until the EC could protect human rights as effectively as the German Constitution, German courts would consider the validity of all EC measures under their own interpretation of human rights.²¹

As a result, the ECJ's quick attempt to pacify German scholars, lawyers, and courts failed as the German Constitutional Court flatly rejected the ECJ's blanket claim of absolute supremacy of EC law over national principles on human rights. Not until 1986 did the German Constitutional Court hold that EC human rights law had sufficiently advanced to

13. FOUNDATIONS, *supra* note 6, at 133.

14. Case 29/69, *Stauder v. City of Ulm*, [1969] E.C.R. 419, 9 C.M.L.R. 112 (1970).

15. Case 11/70, *Internationale Handelsgesellschaft v. EVGF*, [1970] E.C.R. 1125, 11 C.M.L.R. 225 (1972).

16. *Id.*

17. *Id.*

18. *Id.* at 1136.

19. Case 2 BvL 52/71, *Internationale Handelsgesellschaft v. EVGF*, 2 C.M.L.R. 540 (1974) (Bundesverfassungsgericht).

20. *Id.*

21. *Id.* Because the German Constitutional Court found that the EC export license system did not violate fundamental human rights as defined by the German Constitution, it did not in fact rebel against the ECJ's holding.

guarantee adequate protection of human rights—protection akin to that afforded by the German Constitution. This determination made it unnecessary to review EC measures under the German criteria for fundamental human rights.²² Nevertheless, the German Constitutional Court's acceptance of EC law supremacy is not unconditional.²³ It has reserved the ability to examine EC law according to German human rights standards should the EC's protection of human rights fall below a level acceptable to the German Constitutional Court.²⁴

C. The Effect of the European Convention on Human Rights on European Community Human Rights Law

The European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) was established in 1950.²⁵ In 1979, and then again in 1990, the Commission proposed that the EC formally adhere to the Convention.²⁶ Although the Commission wanted to demonstrate to the rest of the world that the EC actively protected fundamental human rights, it realized that accession to the Convention depended on the political resolve of the Member States.²⁷

In response to the Commission's proposal, the Council requested the ECJ's opinion on whether the EC was competent to accede to the Convention.²⁸ Although the EC Treaty did not expressly grant the EC competence in the area of human rights, the Commission argued that implied power could be found in Article 308.²⁹ This Article permits the EC to take appropriate measures, if EC action is necessary to attain an EC objective where the Treaty has not provided the necessary powers. The ECJ held, however, that the EC was not competent to accede to the Convention unless the Member States amended the Community treaties, thereby limiting the use of implied powers under Article 308 and by subjecting it to the general doctrine of conferred powers, as set out in Article 5.³⁰ Although the Court determined that the EC is not bound by the narrow attribution of explicit powers in the Treaty, its implied powers are not without limits, as it must always act within the parameters set by the Treaty.³¹ The ECJ acknowledged that it protects fundamental rights as a general principle of law and

22. *Re the Application of Wünsche Handelsgesellschaft*, [1987] 3 C.M.L.R. 225 (1987) (Bundesverfassungsgericht).

23. *Id.*

24. *Id.*

25. TEU art. 6(2).

26. *Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms*, BULL. EUR. COMMUNITIES, Supp. 2/79, at 5 (1979); Commission Press Release, IP(90)892, Oct. 31, 1990.

27. *Id.*

28. Opinion 2/94, [1996] E.C.R. I-1759.

29. FOUNDATIONS, *supra* note 6, at 170.

30. Marise Cremona, *External Relations and External Competence: The Emergence of an Integrated Policy*, in THE EVOLUTION OF EU LAW 137, 151 (Craig & de Burca eds., 1999) [hereinafter *External Relations*]. Article 5 states that the EC must act within the powers and the objectives conferred by the Treaty.

31. *Id.*

that it is inspired by how Member States and international treaties seek to protect human rights. It even proclaimed that the lawfulness of all EC acts is dependent on respect for human rights.³² The ECJ, however, curbed the use of this seemingly unlimited implied power by holding that Article 308 cannot be used to adopt a measure that would have constitutional significance.³³ For example, Article 308 is not a substitute for the intentionally lengthy procedure for Treaty amendment. Because EC accession to the Convention would grossly modify the EC's system for protecting human rights, and therefore would introduce immeasurable institutional implications for the Member States and the EC, accession could arise only if the Member States amended the Treaty.³⁴ The ECJ's holding implies that the language in the Treaty affording human rights protections is mere "rhetoric [that] affirms the normative commitment to the European Convention on Human Rights, but [that] this commitment is not matched by political practice."³⁵

Essentially, the ECJ did not welcome the idea of the European Court of Human Rights obtaining final jurisdiction on EC human rights issues.³⁶ In *Internationale Handelsgesellschaft*, the ECJ stressed that protection of fundamental human rights was a general principle of law that governed the legality of all EC acts.³⁷ The court further emphasized that the legality of EC acts could only be judged by the EC's own constitutional criteria for human rights; a Member State could not declare an EC act invalid on the grounds that it violated a national conception of human rights.³⁸ Given the ECJ's position on the supremacy of EC law, were it required to forfeit jurisdiction on human rights issues to an external body, such as the proposed European Court of Human Rights, it would fundamentally alter the functioning of the EC legal system. Wishing to avoid such a radical change in the law coupled with a desire to maintain its power, the court required explicit authority for accession through Treaty amendment by the Member States.³⁹ No Member State has since proposed such an amendment.

D. Conclusion

The earliest case law shows the ECJ trying to join the concepts of human rights and EC law, mostly in an effort to pacify Member States, like Ger-

32. Opinion 2/94, [1996] E.C.R. I-1759, ¶ 34. The ECJ acknowledged that it protected fundamental human rights as a general principle of law and that it was inspired by how Member States and international treaties sought to protect human rights. Moreover, it even proclaimed that the lawfulness of all EC acts were dependent on respect for human rights.

33. *Id.* ¶¶ 34-35.

34. *Id.*

35. *Leading by Example: A Human Rights Agenda for the EU for the Year 2000*, 29, <http://www.iue.it/AEL/events.htm> (last visited Mar. 12, 2001) [hereinafter *EU Human Rights Agenda*].

36. FOUNDATIONS, *supra* note 6, at 141.

37. Case 11/70, *Internationale Handelsgesellschaft v. EVGF*, [1970] E.C.R. 1125, 11 C.M.L.R. 225 (1972).

38. *Id.*

39. *External Relations*, *supra* note 30, at 151-52.

many. Later, however, the Commission clearly tried to expand the power of the EC in the human rights arena when it proposed the adoption of the Convention. However, as seen in Opinion 2/94, the ECJ emphatically dashed the Commission's efforts. This decision is particularly noteworthy given that the ECJ is generally supportive of expanding the EC's competence—even at the price of loose Treaty interpretation.⁴⁰ Opinion 2/94 could be read either in a manner that grants the EC only a very narrow capacity to act in the field of international human rights, or in a manner that limits its force to its facts. The constitutional implications of Opinion 2/94 are still unfolding.

II. Constitutional Issues

Every EC act must have a legal basis, meaning that an EC institution must identify a Treaty provision or other appropriate legal authority to support its act.⁴¹ This rule applies equally to internal as well as external acts of the EC. Internally, the EC may act only to the extent that the Treaty has conferred that power.⁴² Externally, the EC may enter into an agreement with a non-Member State only if the subject of the agreement falls within an express power granted under the Treaty⁴³ or if the agreement is necessary to attain one of the EC's objectives.⁴⁴ Whether acting internally or externally, recourse to the residual authority of Article 308 is appropriate only if the EC act is “. . . necessary to attain . . . one of the objectives of the Community . . . and [the] Treaty has not provided the necessary powers”⁴⁵

A. Conferred Powers vs. General Principles of Law

Even after the changes introduced by the Treaty of Amsterdam, the Treaty does not list the protection of human rights as one of its express objectives. Likewise, the Treaty does not have a specific provision on human rights, thereby placing human rights outside the boundaries of the EC's conferred powers. The doctrine of conferred powers is the cornerstone of maintaining the division of power between the EU and the Member States. In essence, if the EU acts beyond those powers conferred by the Treaty, there is a real likelihood that it would trespass on areas reserved to the Member States. Because the scope of the human rights field is potentially unlimited in the sense that it could cover nearly all activities of institutions, public authorities, and individuals, the Member States are sensitive to affording

40. TREVOR C. HARTLEY, *CONSTITUTIONAL PROBLEMS OF THE EUROPEAN UNION* 41 (1999) [hereinafter *CONSTITUTIONAL PROBLEMS*].

41. EC TREATY art. 230; Case 45/86, *Commission of the European Communities v. Council of the European Communities*, [1987] E.C.R. 1493; Case C-300/89, *Commission of the European Communities v. Council of the European Communities*, [1991] I. E.C.R. 2867.

42. EC TREATY art. 5.

43. See, e.g., *id.* art. 133 (discussing the common commercial policy), art. 310 (discussing association agreements).

44. Case 22/70, *Commission of the European Communities v. Council of the European Communities*, [1971] E.C.R. 263.

45. EC TREATY art. 308.

the EU a power over human rights that could encroach on areas of national sovereignty.⁴⁶ To protect national sovereignty, the constitutional principles of limited governance and conferred powers must not be overshadowed by recently created EC powers in the area of human rights.⁴⁷ The ECJ implicitly adopted this limitation when it announced, in Opinion 2/94, that the EC's jurisdiction over human rights issues applies only in the field of Community law. That is, any EC human rights policy should not extend beyond already recognized areas of EC competence.⁴⁸

As discussed above, however, protection of fundamental human rights is a general principle of law protected by the ECJ.⁴⁹ While respect for fundamental human rights is a condition of the legality of EC acts,⁵⁰ a general principle of law alone cannot constitute the legal basis for an EC act.⁵¹ In its early cases on human rights, the ECJ used the general principle of human rights protection as a means of interpreting EC acts.⁵² In addition, the validity of an EC institution's act, whether internal or external, depends on whether the ECJ finds it to be consistent with EC principles of human rights. Therefore, the general principle of human rights can either be an interpretative tool or provide the basis for striking down an act. Despite the utility of this general principle of human rights, unless the EC can base the entirety of its action on an express or implied EC power, as opposed to a general principle of law, it lacks competence to take action without the participation of the Member States through a mixed agreement.

B. Article 308 as a Legal Basis

Recently, the ECJ has limited the Commission's attempt to develop an external human rights policy that does not require Member State participation or Treaty amendment.⁵³ In Opinion 2/94 the ECJ held that "[n]o Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field."⁵⁴ Further, the court stated that the constitutional implications of the Convention were "beyond the scope of Article [308]."⁵⁵ This language suggests that any external agreement with imperative human rights obligations falls outside the EC's competence as conferred by the Treaty.⁵⁶ This view, however, is not widely accepted, and Opinion 2/94 has been

46. *EU Human Rights Agenda*, *supra* note 35, ¶ 60, at 45.

47. *Id.* ¶ 60, at 45-46.

48. *Id.* ¶ 70, at 49.

49. FOUNDATIONS, *supra* note 6, at 133.

50. Opinion 2/94, [1996] E.C.R. I-1759, ¶ 34.

51. *External Relations*, *supra* note 30, at 151.

52. Case 29/69, *Stauder v. City of Ulm*, [1969] E.C.R. 419, 9 C.M.L.R. 112 (1970); Case 11/70, *Internationale Handelsgesellschaft v. EVGF*, [1970] E.C.R. 1125, 11 C.M.L.R. 225 (1972).

53. See discussion *supra* Part I.C.

54. Opinion 2/94, [1996] E.C.R. I-1759, ¶ 27.

55. *Id.* ¶ 35.

56. Angela Ward, *Frameworks for Cooperation between the European Union and Third States: A Viable Matrix for Uniform Human Rights Standards?*, 3 EUR. FOREIGN AFF. REV. 505, 528-31 (1998).

increasingly afforded a narrower reading. The ECJ did not say that Article 308 provided an inappropriate legal basis for entry into agreements involving human rights; that the EC lacked competence to legislate at all in the area of human rights; or that the promotion of human rights was not an EC objective.⁵⁷ Rather, the ECJ focused on the “entry of the Community into a distinct international institutional system”⁵⁸ and the “fundamental institutional implications for the Community and for the Member States.”⁵⁹ Given the narrow reading of Opinion 2/94 and the ECJ’s focus, it has been suggested that an obligatory EC human rights policy could be adopted based, at least in part, on Article 308 provided that it does not: (1) entail entry of the EC into an international institutional system; (2) modify the material content of human rights within the EC legal order; or (3) have fundamental institutional implications.⁶⁰ Thus, to pass the ECJ’s muster, future EC human rights policies should respect the existing institutional balance and involve only those areas in which EC competence is widely accepted.⁶¹

The case of *Portugal v. Council* passed this muster. In it, the ECJ discussed the EC’s competence to engage in human rights issues within the area of development cooperation. Portugal and Greece sought to annul a Council decision to conclude a cooperation agreement between the EC and the Republic of India on partnership and development.⁶² The agreement had been adopted on the basis of the EC’s common commercial policy under Article 133 and development cooperation under Article 181.

Portugal and Greece, however, argued that because the human rights clause was an essential element of the agreement, it should have been based on Article 308 since it went beyond the primarily development-oriented scope of Article 177. The ECJ, emphasizing the “importance to be attached to respect for human rights and democratic principles,” held that the human rights clause, as an essential element of the agreement, could be based on Article 181.⁶³ The ECJ seemed to ground its ruling on the fact that human rights was not a specific field of cooperation under the agreement. Thus the ECJ implied that Article 181’s provisions on development cooperation could not be a legal basis for an agreement where the main purpose was to foster democracy and fundamental human rights.⁶⁴ It should be noted, however, that because the ECJ found Article 181 to be a sufficient legal basis for the India agreement, it did not test the limits of

57. Philip Alston & J. H. H. Weiler, *An EU Human Rights Policy*, in *THE EU AND HUMAN RIGHTS* 3, 24-27 (Philip Alston ed., 1999).

58. Opinion 2/94, [1996] E.C.R. I-1759, ¶ 34.

59. *Id.* ¶ 35.

60. J. H. H. Weiler & Sybilla Fries, *A Human Rights Policy for the European Community and Union: The Question of Competences*, in *THE EU AND HUMAN RIGHTS* 147, 160 (Philip Alston ed., 1999).

61. *EU Human Rights Agenda*, *supra* note 35, ¶ 81, at 52.

62. Case C-268/94, *Portugal v. Council*, [1996] E.C.R. I-6177.

63. *Id.* ¶ 24.

64. Weiler and Fries, *supra* note 60, at 148; Ward, *supra* note 56, at 531.

Article 308. As a result, it did not determine to what extent Article 308 can be used to justify EC external human rights activity.

C. Subsidiarity

In addition to finding a legal basis for its actions, the EU must ensure that it does not violate the principle of subsidiarity.⁶⁵ This principle states that for an EC action to be justified, it must be established that the proposed action cannot be sufficiently achieved by the Member States, and that it can be better achieved by the EC.⁶⁶ This principle, in essence, addresses how power should be divided between Member States and the EC. Unless the EC can act more effectively, the Member States should retain the power to act, except in areas where the EC already exercises exclusive jurisdiction.⁶⁷ The principle of subsidiarity is based on the idea that due to the diverse economic, political, and cultural climates of the EC, it is usually more appropriate for Member States to make their own laws to reflect the diversity between the regions.⁶⁸ While one may start with the supposition that human rights would be best regulated at the national level due to an anticipated variety of ideologies on human rights,⁶⁹ it must be remembered that the EC has jurisdiction to legislate in the field of human rights only within the field of EC law.⁷⁰ Thus, within the parameters of EC competence, it is a logical and necessary conclusion that the EC can better achieve objectives of an EC human rights policy than can the Member States, thus honoring the principle of subsidiarity.⁷¹

III. Treaty Amendments

Opinion 2/94 marks a turning point in the field of human rights for both the ECJ and the Member States. On the one hand, the ECJ responded to the German Constitutional Court's warning that it should not overextend the EC's powers by indiscriminate use of Article 308 and the doctrine of implied powers.⁷² On the other hand, Member States showed, through various Treaty amendments, that even though the EC could not accede to the European Convention on Human Rights, the EC should, nevertheless, vigorously protect and promote human rights and democracy throughout the EC and, eventually, beyond. These treaty amendments are discussed below, as are efforts to achieve reform outside the scope of the treaties.

65. EC TREATY art. 5.

66. *Id.*

67. *Id.*

68. CONSTITUTIONAL PROBLEMS, *supra* note 40, at 85.

69. *See id.*

70. *See discussion supra* Part I.

71. *EU Human Rights Agenda, supra* note 35, ¶¶ 82-84, at 52-53.

72. *Brunner v. European Union Treaty*, [1994] 1 C.M.L.R. 57 (1993), 33 I.L.M. 388; *see also* CONSTITUTIONAL PROBLEMS, *supra* note 40, at 157.

A. The Treaty on European Union and the Amsterdam Amendments

Until the signing of the TEU, the treaties establishing the EC did not expressly protect fundamental human rights. But the ECJ, on its own initiative, defended fundamental rights on the ground that such rights were a general principle of EC law.⁷³ The TEU further emphasized democracy and human rights as cornerstones of the Union by adopting the ECJ's language that human rights are protected as general principles of EC law and that Member State governments are founded on principles of democracy.⁷⁴ The Second Pillar of the TEU also reflected these newly announced principles of human rights. For example, Article 11 of the TEU defines one of the common foreign and security policy objectives as being "to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms."⁷⁵ The EC Treaty uses language virtually identical to Article 11 of the TEU, thereby introducing an express link between democracy and development in its provisions on development cooperation.⁷⁶ These provisions definitively mark the transition from an economic community to a political body.⁷⁷

Notwithstanding Opinion 2/94, Member States' attitudes appeared to shift even further toward a more open protection of fundamental human rights. This shift in attitude is embodied in the Treaty of Amsterdam amendments, which markedly illustrate examples of the newly pronounced Member State commitment to human rights protection and further integration of human rights into the EC legal order. Most notably, the Treaty of Amsterdam affirms, in Article 6(1) of the TEU, that the "Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law . . ."⁷⁸ Further, in Article 6(2) of the TEU, the Treaty of Amsterdam stated that it "shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms[,]. . . as they result from the constitutional traditions common to the Member States, as general principles of Community law."⁷⁹ Importantly, Article 6(2) of the TEU is now specifically rendered justiciable in the ECJ under Article 46(d) of the TEU, thereby giving the ECJ the power to enforce human rights in the EC on a broad scale.⁸⁰

The Treaty of Amsterdam also provides that if a Member State seriously and persistently violates the principles of fundamental rights as expressed in Article 6(1) of the TEU, the Council may, under Article 7 of the TEU, suspend certain EU membership rights, including the right to

73. See discussion *supra* Part I.B.

74. TEU art. 6.

75. *Id.* art. 11.

76. EC Treaty art. 177(2).

77. The External Dimension of Human Rights Policy, from Rome to Maastricht and Beyond, Communication from the Commission, COM(95)567, § 2.

78. TEU art. 6(1).

79. *Id.* art. 6 (2).

80. *Id.* art. 46(d). This Article states that Article 6(2) is justiciable in the ECJ.

vote on the Council.⁸¹ Since such a proposal to suspend membership rights may come from either one-third of the Member States or from the Commission after attaining the assent of Parliament, the Treaty of Amsterdam reaffirms both the Commission's competence to monitor Member States' observance of human rights, and the importance of the European Parliament's awareness and involvement in EC human rights promotion and protection.⁸² Furthermore, the introduction of Article 49 of the TEU now limits the right to apply for EU membership to those European states that respect the principles of fundamental rights set out in Article 6(1) of the TEU.⁸³

The above amendments demonstrate that human rights, as an *internal* matter, are now more fully integrated into the Community legal order. Surprisingly, however, the Treaty of Amsterdam does not take new steps to protect and promote more vigorously human rights as an *external* EC matter. But it has been asserted, in academic and policy circles, that through the amendments in the Treaty of Amsterdam, which increasingly emphasize human rights, the Member States have implicitly acknowledged that human rights are an *internal and external* EC objective.⁸⁴ In fact, some argue that the Treaty of Amsterdam amendments on human rights require the creation of a new EU human rights policy altogether.⁸⁵

B. Reform Beyond Treaty Amendments

Calls to reform the EU's human rights policy to conform it with Treaty rhetoric are sporadic, often depending on current political winds. In 1998, however, the EU itself initiated a major project analyzing the present and future direction of internal and external EU human rights policies.⁸⁶ The thrust of this report was that EU human rights law could not be effective as long as its internal and external objectives were independently pursued. Rather, the internal and external human rights policies can only be effective under a coherent, unified approach. That is, the EU should internally meet or surpass the human rights standards it demands of third countries in order to pursue effectively an external human rights policy.⁸⁷ This is particularly true where the EU requires newly associated states and countries wishing to join the EU to adopt the *acquis communautaire*,⁸⁸ including all EU provisions on fundamental human rights. Not only should there be

81. *Id.* art. 7.

82. *Id.*; TREATY OF AMSTERDAM.

83. TEU arts. 6(1), 49.

84. Barbara Brandtner and Allan Rosas, *Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice*, 9 EUR. J. INT'L L. 468, 472 (1998).

85. *EU Human Rights Agenda*, *supra* note 35, ¶ 44, at 38-39.

86. *See generally id.*; *see also* *European Parliament Annual Report on Human Rights Throughout the World in 1995-1996 and the Union's Human Rights Policy*, *Rapporteur: Mrs. Catherine Lalumière*, EUR. PARL. DOC. (A4-0400/96) (1996) [hereinafter 1995-1996 *European Parliament Annual Report on Human Rights*].

87. *EU Human Rights Agenda*, *supra* note 35, ¶ 5, at 23-24.

88. The *acquis communautaire* comprises the existing laws and regulations of the EU.

a unified human rights policy, but the EC and EU institutions must take a more proactive role in advancing human rights objectives. The ECJ can no longer be the sole supervisor of human rights law violations, as its effect is limited to review of cases involving the alleged violation of human rights.⁸⁹ Specifically, the report advocates that the existing institutional structure should be expanded to include a new Directorate-General for human rights issues so that the EU can create a truly unified and coordinated human rights policy.⁹⁰ Whether the EU will commit such resources and energy to the area of human rights remains to be seen.

IV. Why Protect Human Rights?

Early case law demonstrates that the EU's efforts to promote a unified human rights policy can be constitutionally questionable.⁹¹ But, before the EU forges ahead by imposing its own conception of human rights on others, it should undertake the exercise of defining *why* it should pursue such a policy.

The EC started as a purely economic organization with the primary goal of securing an internal market to enhance the trading status of the EC countries on the world stage. More than thirty years later, the EC ventured into the field of human rights. As a collection of states, it has become a key player in world affairs with nearly seven percent of the world's population, twenty-seven percent of the world's gross domestic product, and as the main provider of over half of the official assistance to developing countries.⁹² To what extent then, has the EU acquired the "responsibility" to defend human rights throughout the world?⁹³ The following Section discusses whether the EU should protect fundamental human rights. Nevertheless, in addition to the legal considerations discussed above,⁹⁴ the EU must consider the non-legal justifications for its new-founded efforts.

A. Human Rights as a Universal Issue

Whether viewed as a product of natural law or an idea inherent in a variety of religions and cultures, humans have been defining the precise rights to which they believe they are morally entitled for centuries. Social, cultural, and religious forces in each individual country have generated attempts to define human rights and how they should be protected.⁹⁵ The first effort to protect and promote human rights on a global scale—irrespective of political persuasion or religious belief—was the 1948 Universal Declaration

89. *EU Human Rights Agenda*, *supra* note 35, ¶¶ 53, 54, at 43-44.

90. *Id.* ¶ 55, at 44.

91. See discussion *supra* Part II.

92. *EU Human Rights Agenda*, *supra* note 35, ¶ 34, at 35.

93. *Id.*

94. See discussion *supra* Part II.

95. Bishop Carlos Filipe Ximenes Belo, *The Dignity of the Individual*, in REFLECTION ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 62 (Barend Van Der Heijden & Bahia Tahzib-Lie eds., 1998).

of Human Rights (the Declaration).⁹⁶ Even though the expression of the rights may be culturally biased toward the West, the basic principles are universal.⁹⁷ Every member of the United Nations, through its endorsement of the Declaration, transformed the Declaration into a universal acknowledgement that basic human rights are common to all cultures, despite other diversities. The signatories formally recognized that these basic rights are inherent in humankind.⁹⁸ Most importantly, the Declaration made the promotion and protection of human rights a truly international issue.⁹⁹ To justify its own external human rights policy, the EU borrows the Declaration's concepts of universality and indivisibility.¹⁰⁰ By promoting human rights as a universal principle, the EU can more easily assert that it is morally right to link the protection of fundamental human rights with trade and development policy—especially if such rights are deemed indivisible.¹⁰¹ Indivisibility means that human rights are interdependent and interrelated with other well-recognized rights. That is, it is impossible to separate civil, political, economic, social, and cultural rights.¹⁰² On this platform, the EU often claims a moral justification for externally projecting its human rights policies.

By acting as a block, the EU projects “multilateral conditionality” in the sense that all fifteen Member States must agree to promote human rights.¹⁰³ As a result, the EU's human rights policy is a collective pronouncement, not the views of one super-state. Thus, as with the Declaration, the EU maintains that any moral overtones achieve legitimacy through numbers.

B. A Western Slant

Critics of the notion that basic human rights are common to all cultures argue that the protection of human rights in any individual country is a

96. G.A. Res. 217 (III), U.N. Doc. A/810 (1948).

97. See Pierre Sané, *An Unfinished Revolution*, in REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, *supra* note 95, at 281.

98. Gabrielle Kirk McDonald, *The Universal Declaration of Human Rights: The International and the American Dream*, in REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, *supra* note 95, at 180.

99. William Pfaff, *Everyone Has a Responsibility*, in REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, *supra* note 95, at 237.

100. Brandtner and Rosas, *supra* note 84, at 484-87; Proposal for a Council Regulation on the Development and Consolidation of Democracy and the Rule of Law and Respect for Human Rights and Fundamental Freedoms, COM(97)357 final [hereinafter Council Regulation on the Development and Consolidation of Democracy]; Council Regulation 975/1999, ¶ 5, 1999 O.J. (L 120) 1; Council Regulation 976/1999, ¶ 5, 1999 O.J. (L 120) 8; Council of the European Union, *European Union Annual Report on Human Rights*, § 5.2., available at http://ue.eu.int/pesc/human_rights/en/99/main5.htm (last visited Oct. 1, 1999) [hereinafter 1999 EU Annual Report on Human Rights].

101. Emma Bonino, *Humanitarian Aid and International Policy*, in REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, *supra* note 95, at 70.

102. Brandtner and Rosas, *supra* note 84, at 485.

103. Karen E. Smith, *The Use of Political Conditionality in the EU's Relations with Third Countries: How Effective?*, 3 EUR. FOREIGN AFF. REV. 253, 257 (1998).

domestic issue and is particularly indicative of state sovereignty. Thus, when the EU imposes its human rights standards on another country, it is not only an illegitimate intervention in the third country's internal affairs, but also an unwarranted challenge to the third state's sovereignty. Proponents of this position argue that the EU should limit its interaction with other countries to strengthening economic and political ties. The promotion of economic and political activities would, though indirectly, increase human rights protections. For example, increased economic activity and positive political consequences are likely to lead to a democratic structure that protects the fundamental rights of its citizens. Making trade and development assistance conditional upon one-sided human rights observance, the argument continues, is actually counterproductive to the overall promotion of human rights.¹⁰⁴

In addition to the above critique, it is worthwhile to examine the assumption that fundamental human rights necessarily flow from democratic societies. The complexity of the human rights issue is illustrated by the enormous differences in cultural experiences that have generated competing concepts of the rights of the individual and obligations of society.¹⁰⁵ Some forcefully argue that the Declaration is not universal; rather, it is a statement of Western philosophy, as evinced by the emphasis on the individual at the expense of community solidarity.¹⁰⁶ More specifically, critics insist that the EU presupposition that democracy and human rights are necessarily linked is an impermissible imposition of Western imperialism.¹⁰⁷ Western sermons on the indivisibility of democracy and human rights are inappropriate given that the West is blind to the cultural diversity that affects perceptions of what human rights are and how they can best be protected.

The correct view, according to this line of thought, is that rights inherent in political objectives should be separate from those fostered by trade policy. Fundamental rights, whatever they include, are necessarily and properly distinct from economic and trade relations between states. For example, if the EU imposes sanctions on a country it judges to be inadequately protecting human rights, the effect could be to isolate those who need help most, and therefore generate even more instability leading to further violations of human rights.¹⁰⁸ Due to the complexity of the issues, critics argue, the promotion of human rights policies should not be controlled by one or several countries, including the EU. International cooperation and mutual respect are sufficient vehicles by which to effectuate

104. See Ali Alatas, *An Indonesian View on Human Rights*, in REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, *supra* note 95, at 25.

105. *Id.* at 23.

106. Pfaff, *supra* note 99, at 237.

107. See Report on the Communication from the Commission on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements Between the Community and Third Countries, COM(95)216, Motion for a Resolution, ¶¶ I-K [hereinafter Report on the Communication from the Commission on the Inclusion of Respect].

108. Franklin L. Lavin, *Asphyxiation or Oxygen? The Sanctions Dilemma*, FOREIGN POL'Y, Fall 1996, at 138.

human rights protections throughout the world.¹⁰⁹ The EU's aggressive opinion is not only unsolicited, but unwanted and inappropriate.

C. Morality and Inconsistency

The universality versus non-universality of human rights debate does not, in actuality, permeate EU thinking on how it should best protect and promote human rights among its trading partners. As a general principle, the EU takes a moral stance by proclaiming that human rights are a universal and indivisible component of its political and trade relations with third countries. The EU does not, however, always apply this general principle in specific cases, particularly if it is not politically or economically expedient or if it is deemed to be an improper intrusion into domestic policy spheres. This inconsistency stems from the EU's vacillation over whether it is morally right to pursue an external human rights policy. However, if morality is removed from the equation, the formula simplifies. In this new light, the EU's application of its human rights policy is both understandable and consistent.

In practice, the EU's human rights policy is based on power, not morals. It projects its notion of human rights when it can, whether for an expected economic return or because it deems it morally just to do so. In effect, the EU does not ask whether it is right or wrong to impose its morality on a third state; it asks only whether it has the ability to do so. Deriving its strength and power from an economic base, the EU unilaterally imposes human rights clauses in bilateral agreements to spread its collective notion of fundamental human rights.¹¹⁰ It plays a normative role by using economic power to spread its ideal of democracy and human rights.¹¹¹ But, it does this only where it has sufficient economic strength, thus demonstrating a total lack of moral commitment to an apparently moral policy. If the EU's human rights policy were based on morality, the price of attaining that morality, even if it meant the loss of trading relations with a powerful partner, would not be relevant to its policy development or execution. Therefore, the EU's "responsibility" to protect human rights lacks a strong moral foundation and is not "reinforced" by its financial resources, but is totally dependent upon them.¹¹²

V. The Evolution of an External Human Rights Strategy

As internal human rights law developed in the EU, the institutions gradually put greater emphasis on external application, or imposition, of its human rights policies. First, the institutions joined the ECJ in protecting human rights and developing internal policies. Then the institutions' policies soon spilled over into the EU's external affairs. This projection into the external realm started slowly in the area of development cooperation

109. Alatas, *supra* note 104, at 24.

110. See generally Smith, *supra* note 103.

111. *Id.*

112. Cf. *EU Human Rights Agenda*, *supra* note 35, ¶ 4, at 22-23.

policy but quickly spread to broad trade areas and even foreign policy. Why the EU jumped into the external realm and continues to press its conception of external human rights on third countries is the pivotal issue behind the global development of its human rights policies.

A. Early Efforts at Human Rights Clauses

The Third Lomé Convention of 1982 marked the EC's first attempt to establish human rights as a fundamental component of its development policy with the Afro-Caribbean and Pacific (ACP) states.¹¹³ Despite the EC's intentions, the provisions were ineffective in practice as they did not condition the EC's continuation of the Lomé development schemes with the respect for human rights.¹¹⁴ By 1991, the EC recognized this weakness and included in the Fourth Lomé Convention (Lomé IV) the first real "human rights clause."¹¹⁵ Article 5 of Lomé IV stated that "cooperation operations shall be conceived in accordance with the positive approach, where respect for human rights is recognized as a basic factor of real development and where cooperation is conceived as a contribution to the promotion of these rights."¹¹⁶ While bold in the sense that it was a new, tougher style of human rights clause, it still drew criticism. In particular, the European Parliament criticized it for not including either the respect for democracy as a basic human right, or an enforcement mechanism for cases of infringement.¹¹⁷

Later in 1991, upon an initiative from the Commission, the Council issued a resolution on human rights, democracy, and development to serve as a direct impetus for consistently including human rights clauses in EC agreements—especially those related to development cooperation.¹¹⁸ The resolution advocated the universal character of human rights and expressly tied human rights to democracy. Furthermore, to remedy the deficiencies of the Lomé IV clause, the Council's resolution listed specific consequences for the infringement of human rights clauses in EC agreements.¹¹⁹ In general, the Council preferred to adopt a positive and constructive approach, as opposed to negative measures or sanctions, to deal with

113. Third ACP-EEC Convention, Dec. 8, 1984, 24 I.L.M. 571 (1985). The first two Lomé Conventions did not mention human rights. As a reaction to the horrific work of Uganda's Idi Amin in the mid-1970's, the EC insisted on incorporating human rights as an objective of development cooperation with the ACP countries. See also Smith, *supra* note 103, at 259.

114. Ward, *supra* note 56, at 507-508.

115. Marise Cremona, *Human Rights and Democracy Clauses in the EC's Trade Agreements*, in *THE EUROPEAN UNION AND WORLD TRADE LAW: AFTER THE GATT URUGUAY ROUND 62* (Nicholas Emiliou & David O'Keeffe eds., 1996) [hereinafter *EU AND WORLD TRADE LAW*].

116. Fourth ACP-EEC Convention, Dec. 15, 1989, 29 I.L.M. 783 (1990).

117. Smith, *supra* note 103, at 259; Ward, *supra* note 56, at 508.

118. *EU AND WORLD TRADE LAW*, *supra* note 115, at 63; *Resolution of the Council and of the Member States Meeting in Council on Human Rights, Democracy and Development*, BULL. EUR. COMMUNITIES, 11-1991, at 122 (1991).

119. *Id.*

deficiencies.¹²⁰

The unifying theme of the EC's various human rights strategies is conditionality. This means that third countries must work to establish a democracy and protect human rights as a condition to receiving aid from the EC.¹²¹ As a result, trading preferences, cooperation and association agreements, aid, diplomatic recognition, and eventual EU membership have all been made conditional on respect for human rights and democracy.¹²² In April 1997, the Council adopted a conclusion on the future of the EC strategy of conditionality.¹²³ The Council stated that bilateral relations with third countries should be developed in a framework that promotes democracy, the rule of law, higher standards for minorities, and human rights.¹²⁴ Third countries' relationships with the EC would progress in tandem as they fulfilled the EC's conditions.¹²⁵ In other words, the EC measures the third country's progress as it jumps through the hoops of complying with EC mandates and human rights conditions.

As a result, since the early 1990s, human rights clauses have been regularly included in EC development cooperation, trade, and association agreements.¹²⁶ These clauses appear in either weak or strong forms, depending on the available enforcement mechanism. The so-called weak versions generally contain language that the agreement is based on respect for democracy and human rights. This language, however, does not provide an essential element to the agreement.¹²⁷ Therefore, violation of the clause is not sufficient to find either a material breach of the agreement or even to justify unilateral suspension of the agreement.¹²⁸ The strong version of human rights and democracy clauses, which the Commission first began using in 1992, provides that respect for human rights and democratic principles is an essential element of the agreement.¹²⁹ Thus, according to the Commission, the strong version provides a legal basis and a justification in international law for taking proportionate reactive mea-

120. The EC is limited in its ability to impose full economic sanctions by its obligations under the General Agreement on Tariffs and Trade. While the suspension of underlying GATT-based obligations is impossible, the EC can rely on United Nations Security Council resolutions to impose a trade embargo to the extent that GATT allows parties to maintain international peace and security. See Cremona, *supra* note 115, at 71-73.

121. See generally Smith, *supra* note 103.

122. *Id.* at 253.

123. Council Conclusions on the Principle of Conditionality Governing the Development of the European Union's Relations with Certain Countries of South-East Europe, BULL. EUR. UNION, 4-97, at 132 (1997).

124. *Id.*

125. *Id.*

126. It should be noted that these human rights clauses merely reflect commonly shared values and reaffirm commitments which, as a matter of international law, already bind states, as well as the EC. See Brandtner & Rosas, *supra* note 84, at 473; see also EU AND WORLD TRADE LAW, *supra* note 115, at 62; 1999 EU Annual Report on Human Rights, *supra* note 100, § 4.2.5.

127. EU AND WORLD TRADE LAW, *supra* note 115, at 71.

128. *Id.*

129. *Id.* at 72-75.

tures in response to a breach of human rights standards.¹³⁰ It was not until the mid-1990s, however, that the EC regularly employed the strong form of human rights clauses, thus firmly linking the principles of human rights and democracy to its trade policy.¹³¹

B. The Model Human Rights Clause

In May 1995, the Council adopted a more aggressive approach to the inclusion of human rights clauses in EC agreements by creating a model human rights clause.¹³² The model clause stipulates that respect for fundamental human rights and democratic principles, as laid down in the Declaration, inspires the internal and external policies of the EC and the third country.¹³³ Importantly, the Council expressly stated that the model clause should be an essential element of bilateral agreements in order to form the basis for the implementation of positive or negative measures, ranging from confidential reproaches to total suspension of cooperation, depending on the gravity of the human rights offenses.¹³⁴ This new flexibility permits the EC to act in accordance with the long-standing principle of proportionality. As an essential element, the model human rights clause could form the basis for a material breach of the agreement, which under the Vienna Convention on the Law of Treaties, is a legitimate ground for suspending the agreement.¹³⁵ Although EC human rights clauses acquired the force of an essential element, the overriding aims of maintaining dialogue between the trading partners and ensuring that the local population was not punished for unacceptable government behavior remained the same.¹³⁶

The European Parliament wholly supported the Commission's move to make human rights a more integral and effective part of relations with third countries. It emphasized the close links between human rights and democracy; the need for the EU to be able to respond quickly to human rights violations; the importance of making human rights issues part of the negotiating mandate for external agreements; and the desire to ensure that legal, political, and moral values remain central to European identity.¹³⁷ In expressing the views of the Member States, the Parliament specifically recommended using bilateral agreements as a "lever" to encourage improved human rights, good governance, and the rule of law.¹³⁸ Indeed, the Parliament believed that the model clause could develop into the "most efficient policy instrument on human rights."¹³⁹ The EU's newly expressed sup-

130. *Id.* at 72.

131. *Id.* at 74-75.

132. See generally Report on the Communication from the Commission on the Inclusion of Respect, *supra* note 107.

133. *Id.*

134. *Id.* at 7, 17.

135. *Id.* at 8; Vienna Convention on the Law of Treaties, May 23, 1969, art. 60(3), 8 I.L.M. 679.

136. Report on the Communication from the Commission on the Inclusion of Respect, *supra* note 107, at 7.

137. *Id.* at 4-5.

138. *Id.* at 10.

139. *Id.* at 16.

port of human rights was, in the Parliament's words, "intrinsic to a modern vision of humanity" and something that "confer[red] prestige and moral authority on the European Union."¹⁴⁰ This moral authority, however, is often exercised selectively, contrary to the primary purpose of the 1995 model clause.¹⁴¹

The 1995 model clause has since been incorporated as an essential element in all subsequently negotiated bilateral agreements of a general nature.¹⁴² Unlike most previous human rights clauses, it enables the EC to suspend the agreements to punish severe human rights violations. The ECJ confirmed this approach in *Portugal v. Council*, in which it recognized that human rights clauses could enable the EC to suspend or terminate an agreement if a third state violated human rights according to standards set by the EC.¹⁴³ In sum, the model clause strives to provide consistency in the application, interpretation, and enforcement of future human rights clauses. While this clause appeared to make the EC's external human rights policy more universal—the same standard would purportedly be applied uniformly, regardless of the substance of or the parties to the agreement—these human rights clauses in reality were not always consistently enforced, or even accepted by the parties to the agreement.¹⁴⁴

C. Recent Legislation

The two most recent pieces of legislation on human rights were adopted by the Council on April 29, 1999. The legislation concerns the requirements for implementing in third countries projects and operations with the aim of promoting democracy, the rule of law, and fundamental human rights and freedoms.¹⁴⁵ The two regulations are similar in content, but have separate legal bases: Article 179 provides the legal basis for operations involving development cooperation,¹⁴⁶ and Article 308 provides the legal basis for all other operations.¹⁴⁷ While the different legal bases will affect the

140. *Id.* at 13.

141. See discussion *infra* Part IV.C.

142. 1999 EU Annual Report on Human Rights, *supra* note 100; *id.* at 16, § 4.2.5. Human rights clauses are generally excluded from sectoral agreements covering discrete subject areas between the EU and third states, which could lead to inconsistent reactions by the EU to human rights abuses. See Ward, *supra* note 56, at 519.

143. Case C-268/94, *Portugal v. Council*, [1996] E.C.R. I-6177, ¶ 27; Brandtner & Rosas, *supra* note 84, at 474.

144. In 1996 Australia refused to accept a human rights clause as part of a trade and cooperation agreement. Instead, Australia and the EU adopted a political declaration. See *Joint Declaration on EU-Australia Relations*, BULL. EUR. UNION, 6-1997, at 117-18 (1997).

145. Council Regulation 975/1999, 1999 O.J. (L 120) 1; Council Regulation 976/1999, 1999 O.J. (L 120) 8.

146. Council Regulation, 975/1999, 1999 O.J. (L120) 1; EC TREATY art. 179.

147. In the Commission's original proposal (COM(97)357 final), the only legal basis suggested was Article 179. Council Regulation on the Development and Consolidation of Democracy, *supra* note 100, preamble. The Committee of Permanent Representatives (COREPER), however, argued that this legal basis alone would not cover operations outside the area of development cooperation. Thus, in November 1997, the Commission split the proposal into two separate acts: one based on Article 179 for developing coun-

extent to which the Member States are involved,¹⁴⁸ the aim of both regulations is to develop a more coherent external human rights policy in addition to providing a definitive legal basis for the financing of projects to implement that policy.¹⁴⁹ The preambles of the regulations recite the importance of coordinating the EC's human rights policy with the EU's foreign policy as a whole, and specifically with the common foreign and security policies. Additionally, the regulations aim to give EC action on human rights, democracy, and the rule of law a stronger identity. EC support may include financing a wide range of projects, including campaigns to increase public awareness, feasibility studies, technical assistance, equipment and facility usage, monitoring capabilities, and regular evaluation procedures.¹⁵⁰ Furthermore, the regulations provide for the creation of the Human Rights and Democracy Committee.¹⁵¹ This Committee is to be composed of representatives of the Member States and is chaired by a representative of the Commission,¹⁵² thus ensuring consistent Member State participation and elevating the importance of a coherent human rights policy within the Commission itself.

The new regulations, while detailed and seemingly comprehensive in scope, have nevertheless been subject to criticism in several respects. First, the regulations appear to address two broad groups of third countries: 1) those that have development cooperation or preferred trade agreements with the EU and 2) those in Central and Eastern Europe that currently benefit from EU aid programs, such as TACIS, MEDA, and PHARE.¹⁵³ The issue then becomes, what about the rest of the world? The new regulations do not cover human rights objectives within non-preferential trade agreements, like those with the U.S. In other words, the EU should be able to address human rights issues in all countries, irrespective of their industrial status or governmental structure.

Second, on an institutional level, the regulations have the effect of centralizing power within the Council and Commission and away from the Parliament. Rather than being involved in the substance of the EC's human

tries, and the other based on Article 308 for operations in non-developing countries. See Common Position (EC) No. 15/1999, 1999 O.J. (C58) 17, 25. It now appears conclusive that Article 308 (EC) is a legitimate basis for the EC's external human rights activities. EC TREATY art. 308.

148. Under Article 308 EC, the Council's decision must be unanimous, whereas under Article 179 EC, the cooperation procedure is used.

149. Council Regulation 975/1999, 1999 O.J. (L 120) 1; Council Regulation 976/1999 O.J. (L120) 8.

150. Council Regulation 975/1999, art. 3, 1999 O.J. (L 120) 1, 4; Council Regulation 976/1999, art. 4, 1999 O.J. (L 120) 8, 11.

151. Council Regulation 975/1999, art. 13, 1999 O.J. (L 120) 1, 6; Council Regulation 976/1999, art. 14, 1999 O.J. (L 120) 8, 13.

152. Council Regulation 975/1999, art. 13, 1999 O.J. (L 120) 1, 6; Council Regulation 976/1999, art. 14, 1999 O.J. (L 120) 8, 13.

153. Through Technical Assistance to the Commonwealth of Independent States (TACIS), the EC assists the New Independent States resulting from the collapse of the Soviet Union. The MEDA regulation provides a vehicle for EC assistance to Mediterranean countries. Poland and Hungary Assistance for the Restructuring of the Economy (PHARE) supports reform in many central and Eastern European countries.

rights policy, the Parliament may exercise influence only through the budgetary procedure.¹⁵⁴ Even though the Human Rights and Democracy Committee protects the interests of the Member States, it does not directly represent the people of Europe to the extent the Parliament does. Ideally, the Parliament should have as much influence as the Member States, whether Member States are represented through the Council or the Human Rights and Democracy Committee, so that the EC itself can set an example of democratic accountability that it demands of third countries.¹⁵⁵ Lack of democratic accountability is a chronic criticism leveled at EU activities.¹⁵⁶ These new regulations exacerbate the situation.

Lastly, because the regulations together earmark more than 400 million euros over five years for human rights projects, there must be adequate measures to guard against corruption and misuse of funds.¹⁵⁷ The regulations do not address issues such as how complaints can be lodged and investigations instigated to examine how the funds are spent or how the policies are administered.¹⁵⁸

As the above regulations are still in their infancy, their effect is unknown. Nonetheless, they have the potential to contribute significantly to a more coherent approach to the EC's external policies in fundamental human rights. These regulations could enable the EC to move away from a sectoral human rights approach and toward a more global incorporation of human rights in all areas of its international relations.¹⁵⁹

D. Human Rights Under the Second Pillar

Title V of the TEU provides for the EU's common foreign and security policy, also known as the Second Pillar of the EU or common foreign and security policy (CFSP).¹⁶⁰ One of its objectives is to "develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms."¹⁶¹ Because the Second Pillar is largely intergovernmental in nature, the Council takes the lead in creating and effectuating the EU's common foreign and security policy, largely through the adoption of common positions.¹⁶² As there are no geographical limits to the CFSP, the EU could use it as a vehicle to cast a wide net for its human rights policies.

The Second Pillar has the infrastructure to support broad human rights policies. In an effort to enhance awareness and effectiveness of CFSP policies and goals, the Treaty of Amsterdam assigns the function of

154. *EU Human Rights Agenda*, *supra* note 35, ¶ 158, at 86.

155. *Id.*

156. CONSTITUTIONAL PROBLEMS, *supra* note 40, at 18-21.

157. *EU Human Rights Agenda*, *supra* note 35, ¶ 159, at 86.

158. *Id.* ¶ 159, at 85.

159. Brandtner & Rosas, *supra* note 84, at 483.

160. TEU tit. V.

161. *Id.* art. 11.

162. Because the EU lacks legal personality, it cannot conclude agreements with third countries. Instead, it must either have the participation of the Member States or use unilateral measures, such as common positions.

High Representative to the Council's Secretary General. In addition, the CFSP High Representative assists the Council President in representing the EU in common foreign and security policy matters on the world stage.¹⁶³ Because human rights protection is a CFSP objective, the High Representative could encourage the Council to become more proactive in the human rights arena—a job made easier by the fact that action under the Second Pillar is largely consensual and without any constitutional limitations.¹⁶⁴ In becoming more proactive, the Council could essentially include human rights as one component in its overall relations with any foreign country.¹⁶⁵ Including human rights as an explicit objective of the Second Pillar is yet further evidence that the EU intends to expand its external human rights policy, as action taken under the CFSP is, by definition, outward looking. Whether the High Representative will accept this challenge, however, remains to be seen.

E. A Promising Foundation—Will the EU Use It?

Overall, the link between human rights and negative measures, such as sanctions in the form of suspension of aid or trade preferences, gradually gave way to a more positive approach of encouraging the growth of democratic institutions, thereby strengthening the rule of law and promoting human rights initiatives.¹⁶⁶ The EU's legislative direction seems to demonstrate its commitment to developing a foreign policy based on human rights and democratic principles by making aid conditional upon the fulfillment of standardized notions of human rights and democracy. Similarly, the Second Pillar provides significant latitude for Member States to recognize human rights as a basic tenet of EU foreign policy. The EU's resolve, however, can shift according to political winds.

VI. Effectiveness: A Function of Politics

From its internal to external applications, the EU's human rights policy has evolved from being an afterthought to the ECJ's attempt to maintain supremacy of EC law over Member States' national laws,¹⁶⁷ to an aggressive pursuit of a global human rights standard through conditionality clauses in bilateral agreements with its trading partners. While its human rights policy grows bolder, the question remains as to whether it is simultaneously growing more effective. Are the EU's human rights policy pronouncements followed by corresponding applications of that policy? The best yardstick by which to measure the EU's commitment to its external human rights policy is its willingness to defend the human rights clauses in its bilateral agreements. Likewise, the EU's enthusiasm for amending old agreements to include human rights clauses is also instructive.

163. TEU art. 18.

164. *EU Human Rights Agenda*, *supra* note 35, ¶ 165, at 88.

165. *Id.* ¶ 169, at 89.

166. *Id.* ¶ 20, at 30.

167. Case 29/69, *Stauder v. City of Ulm*, [1969] E.C.R. 419, 9 C.M.L.R. 112 (1970).

In short, how strong are the links between the EU's external human rights policies and its current development cooperation and trade policies? By comparing disparate attitudes toward China and Myanmar, it becomes evident that the EU's human rights policies are essentially an exercise of economic power, not morality. Thus, as the EU's economic power is limited, so is its commitment to developing and defending human rights on a global scale.

A. China

In 1978, the EC and China entered into their first trade agreement.¹⁶⁸ As relations expanded, mostly through increased EC exports, loans, and investments in China, these partners concluded a new Trade and Economic Cooperation Agreement in 1985. The 1985 agreement was broader in scope than the first trade agreement and provided for cooperation in trade and economic matters.¹⁶⁹ While the agreement includes a most-favored-nations (MFN) clause, a balance of trade clause, and clauses on exchange of information and consultations to promote trade, it does not include a human rights clause.¹⁷⁰ In addition to the agreement, EC trade with China is governed by a general Council regulation on common rules for imports from State-trading countries.¹⁷¹ Moreover, the EU maintains a running dialogue with China on human rights. Twice a year ministers from the EU and Chinese governments meet to discuss the EU's concerns about human rights developments, or lack thereof, in China.¹⁷² Additionally, the Asia-Europe Meeting serves as a platform for dialogue between Asian and EU countries on many issues, including human rights.¹⁷³

The EU has espoused the importance of improving trading relations with China for several years. Not only did the end of the Cold War support democratic reform in the former Eastern European states, but it seemed to kick-start the transition to market economies in many Asian countries. As the economies grew and the Asian nations increased their wealth, the large Asian populations became ready sources of new consumers. In 1994 the World Bank predicted that economic growth in Asia would ensure that by

168. Trade Agreement between the European Economic Community and the People's Republic of China, 1978 O.J. (L 123) 2.

169. Agreement on Trade and Cooperation between the European Economic Community and the People's Republic of China, 1985 O.J. (L 250) 1 [hereinafter 1985 Agreement]; see also Francis Snyder, *Legal Aspects of Trade Between The European Union and China: Preliminary Reflections*, in *THE EUROPEAN UNION AND WORLD TRADE LAW: AFTER THE GATT URUGUAY ROUND*, *supra* note 115, at 363, at 366 [hereinafter *Legal Aspects of Trade*].

170. 1985 Agreement, *supra* note 169.

171. Council Regulation EC No. 519/94, Common Rules for Imports from Certain Third Countries, 1994 O.J. (L 67) 89. Note, this regulation does not affect trade in textiles, which is governed by a separate regulation. See Francis Snyder, *INTERNATIONAL TRADE AND CUSTOMS LAW OF THE EUROPEAN UNION* 595 (1998).

172. 1999 EU Annual Report on Human Rights, *supra* note 100, § 4.2.3.

173. *Id.* Interestingly, EU relations with China were only temporarily interrupted with China following the events of Tiananmen Square. The EC instituted trade sanctions between June 4, 1989 and October 22, 1990. *Legal Aspects of Trade*, *supra* note 169, at 365.

the year 2000, one billion Asians would have "significant" consumer spending power, 400 million of whom would have disposable incomes equal to or greater than their European and U.S. counterparts.¹⁷⁴

Despite the economic potential, EU direct investment has historically been much lower in China than in other emerging markets, causing the EU to conclude that it is missing business opportunities in China and must, therefore, pursue the Chinese markets as aggressively as those in the United States and Japan.¹⁷⁵ As a result, EU-China trade continues to grow at a rapid pace, although the EU has usually imported more from China than it has exported to China.¹⁷⁶ During the 1990s, the trade deficit remained in the eight to ten billion ECU range.¹⁷⁷

In 1994, the Commission stated, in a communication to the Council, that human rights would be a "major objective" of the EU's external policy with Asia.¹⁷⁸ The Commission characterized the need for stronger European-Asia ties as a "matter of urgency" if the EU was serious about maintaining a leading role in the world economy.¹⁷⁹ While the Commission mostly recommended increased economic relations and political dialogue, it also stated, "[M]atters relating to good governance, including human rights, should also play an important role in the Union's relations with Asian countries."¹⁸⁰ In fact, it listed, as an overall objective of EU-Asia ties, that the EU would "contribute to the development and consolidation [sic] of democracy and the rule of law, and respect for human rights and fundamental freedoms in Asia."¹⁸¹ Further, human rights is listed as a subject for discussion to enhance political dialogue with Asia, though the Commission declared that the EC cannot impose European values on Asian countries.¹⁸² The Commission, however, did not suggest taking positive steps to promote human rights, such as supporting elections and a free media, and at no point did it suggest linking human rights improvements to increased economic trade.¹⁸³

Indeed, the Commission seems to justify its own hesitation to link human rights with trade issues by highlighting that the U.S. "shifted" its trade policy toward Asia by extending MFN status to Chinese exports—thereby de-linking trade and human rights. In the Commission's words, the U.S. shift may be regarded as a "move towards a more long-term strat-

174. Communication from the Commission to the Council, Towards a New Asia Strategy, COM(94)314 final, at 1 [hereinafter Towards a New Asia Strategy].

175. Communication from the Commission, A Long Term Policy for China-Europe Relations, COM(95)279 final, at 9 [hereinafter A Long Term Policy for China-Europe Relations].

176. *Id.*

177. *Id.* A European Currency Unit [ECU] is a fluctuating value calculated from a basket of national currencies which are weighted according to their strengths.

178. Towards a New Asia Strategy, *supra* note 174, at 3; *see also* EU AND WORLD TRADE LAW, *supra* note 115, at 67-68.

179. Towards a New Asia Strategy, *supra* note 174, at 1.

180. *Id.* at 2.

181. *Id.* at 3.

182. *Id.* at 12, 18.

183. *See generally id.*

egy aimed at influencing developments in China by further integrating China into world trade and economic relations."¹⁸⁴

Similarly, the Commission chose to de-link human rights and Asian trade issues. Although it proclaimed that fundamental human rights are a major objective of the external policy of the European Union, it also stated that "[t]he concept of the interrelationship between human rights, democracy and development, should be inspired by the assumption that economic development could bring about the progressive construction of civil society and thus improve the exercise of human rights, which in their turn could also be an important factor for development."¹⁸⁵ Basically, the Commission announced that human rights relations with Asia should be confined to a political field, thereby excluding human rights policy as a basis for economic cooperation. This philosophy seems distinctly at odds with the notions of conditionality¹⁸⁶ and is particularly unsettling given the EC's introduction of its model human rights clause the following year.

The European Parliament clearly disagreed with the EU's proclaimed stance that there should be no fixed link between trade and human rights and used EU relations with China to express its disagreement.¹⁸⁷ In February 1994, it adopted a resolution calling for China to respect human rights and fundamental freedoms as well as adopt internationally respected social standards.¹⁸⁸ On the issue of human rights, the Parliament stressed the universal nature of human rights, as defined by the Declaration, to which China is a signatory.¹⁸⁹ Specifically, it called on China to end its use of the death penalty, create a legal system independent of the political system, halt torture and forced abortions, and respect the rights of minorities and political dissidents.¹⁹⁰

On trade, the Parliament noted that China still must more fully open its markets to competition to correct the trade imbalance between the regions.¹⁹¹ It also insisted that future trade or cooperation agreements must be accompanied by human rights clauses.¹⁹² Unless China undertook efforts to increase democracy and improve its human rights record, the Parliament advised that the EU should not approve any new cooperation agreements. Unlike the Commission, the Parliament maintained that true improvement in China's human rights affairs would not happen without a direct link to trade agreements. The Parliament, however, was ignored.

184. *Id.* at 8.

185. *Id.* at 12.

186. See discussion *supra* Part V.A.

187. *Legal Aspects of Trade*, *supra* note 169, at 375.

188. European Parliament, Resolution on Relations between the European Union and the People's Republic of China, 1994 O.J. (C 61) 71-74 [hereinafter Resolution on Relations between the European Union and China].

189. *Id.* at 72.

190. *Id.* at 72-73.

191. *Id.* at 73.

192. *Id.* at 74.

Without heed to the Parliament's critique of EU-China affairs, the Commission further refined its views for future relations with China in a 1995 communication.¹⁹³ Again, the Commission refrained from directly linking human rights and trade issues. Rather, it concentrated on the importance of creating an "action-oriented" policy reflecting China's rapidly increasing economic and political influence throughout Asia and the world.¹⁹⁴ According to the Commission, better relations with China would serve not only Europe's economic interests, but its foreign security and environmental interests as well.¹⁹⁵

In the 1995 communication, the Commission addressed the importance of human rights as a basis for all EU policies and proclaimed it necessary for long-term political and social stability.¹⁹⁶ Effectiveness is deemed the most important element of the EU's human rights policy, given that there is a "danger that relying solely on frequent and strident declarations will dilute the message or lead to knee-jerk reactions from the Chinese government."¹⁹⁷ This language appears to be typically cautious, yet stronger than its language the previous year when the Commission hesitated to impose European values on an Eastern society.¹⁹⁸ To maximize the effectiveness of its human rights policy in China, the Commission proposed that the EU encourage the development of a Chinese society based on the rule of law, aim to regularly raise human rights issues in all bilateral dialogue with China, and involve the international community in its dialogue with China through multilateral platforms, such as the United Nations Commission on Human Rights.

But, in language reminiscent of its 1994 communication, the Commission summarized that "EU policy is based on the well-founded belief that human rights tend to be better understood and better protected in societies open to the free flow of trade, investment, people, and ideas."¹⁹⁹ In other words, if the EU can further economic ties with China, heightened awareness of human rights will automatically follow. While the Commission advocated "practical cooperation" in the form of assistance in the judicial and legal fields as a means of helping China develop a society based on the rule of law, it did not recommend doing so if it meant compromising the development of important economic and trade relations.²⁰⁰

Three years later, the Commission updated its long-term strategy towards China due to China's continued market reforms and increased role in regional and global foreign policy, as well as the financial crisis that hit

193. A Long Term Policy for China-Europe Relations, *supra* note 175.

194. *Id.* at 1.

195. *Id.* at 2.

196. *Id.* at 4.

197. *Id.*

198. Resolution on Relations between the European Union and China, *supra* note 188, at 71-74.

199. A Long Term Policy for China-Europe Relations, *supra* note 175, at 5.

200. *Id.* at 6.

Asia in 1997.²⁰¹ The Commission predicted that China's perception of Europe might alter due to changes within the EU, such as eastward expansion, the single currency, and enhanced foreign policy power for the EU under the Treaty of Amsterdam.²⁰² One of the aims of the revised partnership was to support China's development as a society based on the rule of law and respect for human rights.²⁰³ Yet, as in 1995, the Commission established no link between trade and human rights policies.²⁰⁴ In fact, it expressly stated that dialogue on human rights, "without any preconditions . . . remains at present the most appropriate means of contributing to human rights in China."²⁰⁵ The Commission sees dialogue as a means of achieving cooperation programs, yet there is no suggestion that those cooperation programs, such as support for programs that foster the rule of law or strengthen civil society, should be conditioned on China's respect for human rights.

In addition to general EU strategies, specific agreements can be effective tools for achieving human rights goals. Many EU trade and cooperation agreements negotiated before 1995 did not contain any human rights clauses. When the EC formally declared that it would include human rights clauses in all subsequently negotiated agreements, the European Parliament called on it to renegotiate existing trade agreements to add such clauses.²⁰⁶ The European Parliament's position was consistent with its earlier declaration that the EU's strong policy approach to human rights should engender the prestige and moral authority necessary to accomplish its goals.²⁰⁷

To date, however, the EU has not renegotiated the 1985 Trade and Cooperation Agreement with China to include a human rights clause, nor have human rights clauses been included in newer, sectoral trade agreements with China.²⁰⁸ Unless the Trade and Cooperation Agreement with China is renegotiated to include an effective human rights clause, relations with China will continue to evolve without regard for serious binding commitments to human rights in China.²⁰⁹ The primary fear of human rights proponents is that the EU's trade relations with China will take the form of sectoral agreements that are not, as a matter of policy, affected by human rights clauses.²¹⁰ For example, in 1988 the EC and China entered into a

201. Communication from the Commission, Building a Comprehensive Partnership with China, COM(98)181 final, at 3 [hereinafter Building a Comprehensive Partnership with China].

202. *Id.* at 4.

203. *Id.*

204. *See generally id.*

205. *Id.* at 9.

206. 1995-1996 European Parliament Annual Report on Human Rights, *supra* note 86, at 67.

207. *See generally* Report on the Communication from the Commission on the Inclusion of Respect, *supra* note 107.

208. Ward, *supra* note 56, at 520.

209. *Id.*

210. *Id.* at 527.

textile agreement which is periodically extended.²¹¹ In 1995, an even narrower agreement addressing silk and linen was concluded.²¹² If trade with China continues to develop on a sectoral basis, whether the general 1985 Trade and Cooperation Agreement is amended to include a human rights clause will become unimportant. As more products fall outside the 1985 Trade and Cooperation Agreement, the less influence the agreement will have as a tool to force the improvement of human rights in China.

The Commission clearly desires to smooth relations with China so that important commercial deals can succeed. Given the high importance attached to increasing trade with China and including China in global affairs, the EU does not presently consider it in its long-term interest to pursue an aggressive stand on human rights in China. Rather than issue conditions, the EU issues declarations. And instead of linking human rights and trade issues, it expressly de-links them. The Commission seems to argue that if commercial deals are hampered by meddlesome EU policies on human rights, the trade with China may not progress as rapidly as hoped, thus leading to a worsening of human rights conditions within China. As noted by one scholar, "the Union's policy on human rights in China has been moving away from one characterized by persistent and robust criticism, to a more delicate and protracted strategy of constructive dialogue."²¹³

Ironically, although the volume of dialogue on human rights in China is now lower, the frequency and status of the discussions has increased. Since 1994, EU-China dialogue has occurred at a higher level than ever before in an effort to encourage Chinese participation in a wide range of global affairs.²¹⁴ The desired dialogue is as broad as "issues of common interest and global significance" which should foster the necessary exchange of views as a precursor to coordinated development on global and regional security interests, as well as human rights.²¹⁵ The Commission has proposed that the EU and China "raise the status of their relationship by holding annual summits at Head of State and Government level" so that the EU-China relationship acquires the status and importance of the EU's relationships with other major trading partners, like Japan and the United States.²¹⁶

Even the topic of human rights in China has been elevated to new heights. In its first Annual Report on Human Rights, the EU gives particular attention to China's human rights situation. The EU is primarily concerned with restraints on freedom of opinion, expression and assembly, extensive and seemingly political use of the death penalty, and arbitrary

211. *Legal Aspects of Trade*, *supra* note 169, at 369.

212. *Id.* at 372; Agreement between the European Community and the People's Republic of China on Trade in Textile Products not Covered by the MFA Bilateral Agreement, 1995 O.J. (L 104) 2.

213. Ward, *supra* note 56, at 520.

214. A Long Term Policy for China-Europe Relations, *supra* note 175, at 4.

215. *Id.*

216. Building a Comprehensive Partnership with China, *supra* note 201, at 5.

detention and the use of forced labor camps.²¹⁷ Additionally, religious and cultural minorities, such as the Tibetans, continue to suffer violations of their human rights under Chinese rule. Unfortunately, however, the EU's pronouncements still have no teeth. While the EU unabashedly states that it "intends to make the human rights dialogue with China focused and more orientated towards concrete improvement in the human rights situation,"²¹⁸ it offers no tools with which to accomplish that goal. Its declaration is only that—a declaration without a means of execution.

Despite the rhetoric calling for action-oriented policies, the EU continues to issue, in effect, mere declarations when it comes to human rights. Improved relations with China is the EU's primary focus because of China's economic importance. So important is China's economic position that its tangential goal of raising the standard of global human rights has been pushed to the back burner. Meanwhile, the Chinese economy stews and thickens, free from Western conceptions and imposition of human rights.

B. Myanmar

In contrast to China, the EU's reaction to human rights violations in Myanmar is markedly different. The different treatment of these two countries' human rights abuses demonstrates that the EU's human rights policy rests on perceptions of power, rather than declarations of morality.

In 1980, the EU entered a cooperation agreement with the Association of Southeast Asian Nations (ASEAN) to strengthen regional integration and consolidate commercial relations between the EU and southeast Asia.²¹⁹ Although ASEAN allowed Myanmar to join it in 1997, the EU refused to open negotiations for Myanmar to accede to the EC-ASEAN cooperation agreement due to its horrific human rights record, and in particular, its regular use of forced labor.²²⁰ The EU essentially demanded that Myanmar improve its human rights record, as well as its overall political situation, before it would consider allowing Myanmar to accede.²²¹ Much of the responsibility for eradicating the abuses in Myanmar was placed on ASEAN itself, as the EU and U.S. insisted that ASEAN fulfil its promise of "constructive political commitment" by creating policies aimed specifically at improving human rights and democracy in Myanmar.²²² Until ASEAN can demonstrate that it can manage and improve the situation in Myanmar, the latter will remain outside the EC-ASEAN cooperation agreement.²²³

Also in 1997, the EU withdrew Myanmar's benefits under the EC's Generalized System of Preferences (GSP), again due to its unacceptable

217. See generally *EU Annual Report on Human Rights*, *supra* note 100.

218. *Id.* § 4.2.3.

219. The current members of ASEAN are Brunei Darussalam, Cambodia, Indonesia, Laos, Myanmar, Malaysia, the Philippines, Singapore, Thailand and Vietnam.

220. Agence Europe No. 7025, Jul. 28-29, 1997.

221. *Id.*

222. *Id.*

223. *Id.*

human rights record concerning the use of forced labor.²²⁴ After hearings and confidential statements, the EU concluded that forced labor was routine and widespread, without regard for the sex, age or health of the affected individuals.²²⁵ The EU withdrew GSP support for industrial and agricultural goods until such time as Myanmar demonstrated that it no longer used forced labor.²²⁶ In support of the EU's proposed action, the Economic and Social Committee praised the measure as "a clear signal to the EU's trading partners that the EU is serious about its determination to use the GSP to meet the goals for which it was created, namely to improve the conditions of people in the developing countries . . ." ²²⁷ The Committee also cited European public opinion as a justification for the EU's decisive action.²²⁸ Indeed, the EU's withdrawal of GSP preference was characterized as a response to "[t]rade unions, non-governmental organizations including human rights groups and consumer organizations [which] have all expressed support for the taking of strong measures by the EU."²²⁹ The Committee noted that public human rights campaigners drew particular attention to the fact that EU multinational companies may indirectly benefit from the use of forced labor and requested that the Commission "pay special attention" to the involvement of these multinational companies when it monitors human rights developments in Myanmar.²³⁰

Because the human rights situation in Myanmar is still dire, the EU has pressed ahead with efforts to punish the country both economically and politically. In June 1999, the EU supported the adoption, by the International Labor Conference, of an emergency resolution on forced labor in Myanmar.²³¹ The resolution declared the government's use and endorsement of forced labor to be incompatible with membership in the International Labor Organization (ILO) and therefore removed ILO technical assistance from Myanmar.²³² In October 1999, the EU extended its original common position on relations with Myanmar.²³³ Through this common position, the EU has effectively severed diplomatic relations with

224. 1999 *EU Annual Report on Human Rights*, *supra* note 100, § 4.2.5. The GSP is the scheme under which the EC grants non-reciprocal trade preferences to developing countries as a means of using trade as a development tool.

225. Council Regulation (EC) 552/97, Temporarily Withdrawing Access to Generalized Tariff Preferences from the Union of Myanmar, 1997 O.J. (L 085) 8-9 (Mar. 24, 1997) [hereinafter Temporarily Withdrawing Access]; Proposal for a Council Regulation (EC), COM(96)711 final, at 1-2.

226. Temporarily Withdrawing Access, *supra* note 225, at 9; Proposal for a Council Regulation, COM(96)711 final, *supra* note 225, at 2.

227. Opinion of the Economic and Social Committee, 1997 O.J. (C 133) 47.

228. *Id.* at 48.

229. *Id.*

230. *Id.*

231. 1999 *EU Annual Report on Human Rights*, *supra* note 100, § 5.9.

232. *Id.*

233. Common Position of 28 October 1996 Defined by the Council on the Basis of Article J.2 of the Treaty on European Union, on Burma/Myanmar, 1996 O.J. (L 287) 1-2 [hereinafter Common Position on Burma/Myanmar]; Council Common Position of 11 October 1999 Concerning the Extension of Common Position 96/635/CFSP on Burma/Myanmar, 1999 O.J. (L 267) 1.

Myanmar. Until Myanmar makes progress towards democratization and improves its human rights record, the common position will be renewed every six months.²³⁴

C. Different Treatment for Different Countries

The EU responded relatively swiftly and harshly to the human rights abuses in Myanmar. Its moral stance sends a clear signal to the Myanmar government that unless it cleans up its human rights record, it will be increasingly shunned on the world trading stage. The EU exercised its moral authority by judging the human rights situation in Myanmar unsatisfactory, and therefore a sufficient justification for halting GSP preferences. It enjoyed the advantage of appeasing the outraged public, even to the extent that it recognized the previously unchecked role played by EU multinational companies. The EU's action toward Myanmar is wholly consistent with its rhetoric of the last decade regarding why human rights improvement should be a paramount goal of EU external policy.

With China, however, the situation is different. The human rights abuses in China, including mass government-endorsed executions, the repression of freedom of speech, religion and reproductive rights, along with a steady abuse of cultural and ethnic minorities are, one could easily argue, as serious as the human rights abuses in Myanmar. In fact, the EU itself consistently stresses that all human rights have "equal value."²³⁵ But with China, the EU boldly states that it must not impose its Western values on Eastern society and that a human rights policy can be better pursued through political rather than economic channels. Nowhere does the EU take account of public opinion in its relations with China. The EU chooses to take significant action regarding human rights abuses in Myanmar, but merely criticizes abuses in China. Why the difference?

Money. In its various proposals for a long-term relationship with China, the Commission repeatedly stresses the importance of China to Europe. China provides millions of consumers for EU products. With its economic reforms and potential membership in the World Trade Organization, China is fertile ground for foreign investment in large sectors like utilities and telecommunications. China is also strategically important from a foreign policy perspective. As a nuclear power, China will play an increasingly important role in regional and global foreign policy affairs. China, in other words, cannot be effectively lashed with European morality without consequential financial harm to Europe. Any action that the EU takes that hinders trade relations, such as issuing sanctions, suspending trade cooperation, or withdrawing GSP preferences, in response to human rights violations will only slow the EU's realization of economic gain. Due to the economic promise China holds, as well as the stiff competition from the U.S. and Japan, the EU cannot afford to let morality interfere with its need to trade competitively with China.

234. Common Position on Burma/Myanmar, *supra* note 233, ¶ 7.

235. 1999 EU Annual Report on Human Rights, *supra* note 100, § 5.1.

Myanmar, however, is nearly expendable. It is a bit actor on the world trading stage, it is not a nuclear power, and it lacks a vast consumer base to offer European producers. In this situation, the EU can afford to take the moral high ground by proudly and publicly withdrawing GSP trading preferences. It has little to lose economically and much to gain politically by firmly linking human rights to trade issues with Myanmar. Unfortunately, the EU has too much to lose should it take this stand with China.

D. The Achievements of Evolution

As the comparison between EU human rights policies toward Myanmar and China shows, the doctrine of conditionality competes with other considerations of foreign policy, such as commercial, geopolitical, and strategic interests. "Weak" states are more likely to suffer interruption of human rights aid than are "strong" states.²³⁶ Strong states, like China, which have a more secure bargaining position with the EU tend to get only light sanctions, such as declarations and *démarches*. The European Parliament has criticized this apparent inconsistent application of the EU's human rights policy, stating that "the EU bodies apply double standards when reacting to human rights abuses from different countries depending on their economic and strategic potential."²³⁷ But, if one views the EU human rights policy as an exercise in power and not morality, there is no inconsistency in policy application. Rather, the EU exercises its economic power to achieve human rights goals to the extent that it is economically feasible. Where the EU lacks sufficient economic power to influence fundamental human rights in a third country, as is the case with China, its position on human rights becomes more flexible and less critical to trade negotiations.

Conclusion

To say that the EU has a "double standard" is misleading. The only standard the EU has is that based on practical feasibility, if not possibility. This reactive, flexible approach to human rights is far from the moralistic and aggressive pursuit of human rights that the EU sets forth in its treaties and resolutions. The EU has decided that it must first establish clear economic supremacy before it can really influence human rights development and impose its morals on "strong" countries, like China. With a weaker trading partner, like Myanmar, the EU can afford to make policy based on morals. Within the internal sphere, the EU need worry only about acceptance by its Member States, as illustrated by the EC's frantic efforts to ease Germany's constitutional concerns over human rights protection. Within the external sphere, however, it must recognize and contend with the limits of its ability to significantly affect human rights throughout the world. The EU has demonstrated that it is prepared to champion human rights causes only as far as its economic might allows.

236. Smith, *supra* note 103, at 272.

237. Report on the Communication from the Commission on the Inclusion of Respect, *supra* note 107, at 16.

